Sher Blackwell
ATTORNEYS AT LAW

Suite 900 · 1850 M Street, N.W. · Washington, D.C. 20036
Telephone: 202.463.2500 Facsimile: 202.463.4950 · www.sherblackwell.com

A LIMITED LIABILITY PARTNERSHIP

WRITER'S DIRECT DIAL:
(202) 463-2510

November 8, 2001

By Hand

Ms. Magalie Roman Salas
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation By EarthLink, Inc. in GN Docket No. 00-185 Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink), we hereby submit for inclusion in the above-referenced docket an original and one copy of a permitted written *ex parte* communication that is being delivered today to Mr. Kenneth Ferree, Chief of the Cable Services Bureau. An electronic copy of the attached letter will also be sent by email to Mr. Ferree.

Please direct any questions regarding this filing to the undersigned. Thank you for your assistance in this matter.

Respectfully submitted,

John W. Butler

Counsel for EarthLink, Inc.

cc: Qualex International

Sher Blackwell
ATTORNEYS AT LAW

Suite 900 · 1850 M Street, N.W. · Washington, D.C. 20036
Telephone: 202.463.2500 Facsimile: 202.463.4950 · www.sherblackwell.com

A LIMITED LIABILITY PARTNERSHIP

Direct Dial
(202) 463-2510/2514

November 8, 2001

By Courier and E-Mail

Mr. Kenneth W. Ferree, Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Ferree:

On behalf of EarthLink, Inc. ("EarthLink"), we would like to provide as background for your November 14, 2001, meeting with Dave Baker of EarthLink a summary of EarthLink's position on the points relevant to the proper classification of the "cable modem service" that the Commission is examining in Docket 00-185. As EarthLink has argued for a number of years, both in this proceeding and others, the Communications Act and the Commission's longstanding precedent require that facilities-based carriers that offer information services to the public for a fee must make available on nondiscriminatory rates, terms, and conditions the underlying telecommunications used to transmit those information services to the public.

The purpose of this letter is not to repeat at length all of the arguments that are already part of the record. Rather, we take this opportunity to respond specifically to recent *ex parte* filings by Cox Communications, Inc. and its subsidiaries ("Cox") and NCTA. Those filings are important because they represent the first cable industry acknowledgement of the fact that the "cable open access" debate ultimately turns on the single, simple question of whether the Communications Act and the Commission's rules allow facilities-based carriers that provide Internet access to millions of customers to refuse to sell their transmission capacity to other ISPs.

I. The Cable Companies' Argument That Their Internet Access Services Do Not Include Telecommunications Services Because The Cable Companies Are Not Providing "Pure Transmission" Ignores The Language of the Communications Act And Over Twenty Years Of Commission Precedent.

In its August 15, 2001, and October 16, 2001, *ex parte* filings in Docket 00-185, Cox argues that it has no obligation to sell to other ISPs Cox's facilities-based transmission capabilities used by Cox to provide Internet access to its customers. Cox's rationale for this argument is that since Internet access is an unregulated information service, and Cox claims not to offer "pure transmission" service to its customers, it is not providing telecommunications services subject to regulation under Title II of the Act. NCTA makes the same assertion in its September 20, 2001 *ex parte* filing. Cox summarizes the argument this way in its October 16, 2001 *ex parte* filing:

> A provider who utilizes telecommunications (whether self-provisioned or obtained from another entity) as an input to provide an information service cannot be regulated as a common carrier, so long as it does not offer a pure transmission path for a fee directly to the public.

Cox Brief at 34-35.[1] This assertion is incorrect as a matter of law as it applies to Cox and other cable company ISPs that transmit their Internet access services over their own transmission networks. The statement is only correct as it applies to information service providers that purchase the underlying telecommunications from a separate common carrier. With respect to information service providers that use their own facilities (such as cable companies offering Internet access), however, the assertion is flatly inconsistent with over twenty years of Commission precedent, precedent that the Commission has explicitly found that Congress adopted in the Telecommunications Act of 1996. Contrary to Cox's assertion that "the ownership of facilities by an information service provider is irrelevant to the analysis of the service offered to the public," the Commission has made it quite clear that where an entity uses its own transmission facilities to provide an information service to the public, that entity is required as a condition of being allowed to provide information services to make its transmission facilities available to other information service providers.[2]

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[1] Cox's October 16, 2001, *ex parte* filing consists of a brief filed by Cox in *Bova v. Cox*, Civil Action No. 7:01 CV 00090, pending in the United States District Court for the Western District of Virginia (hereinafter "Cox Brief"). The central issue is that case is the proper regulatory classification of cable-based transport underlying Internet access. By order dated October 19, 2001, the court has postponed trial in the case pending the decision of the United States Supreme Court in *FCC v. Gulf Power* (argued October 2, 2001). The proliferation of cases such as *Bova* and *Gulf Power*, which have arisen because of the Commission's unwillingness to address the classification issue, highlights the fact that the Commission will have the issue decided for it if it does not itself render a decision in the very near future.

[2] In addition to the cases discussed *infra*, notes 3 – 11 and accompanying text, *see In the Matter of Independent Data Manufacturer's Association, Inc.*, 10 FCC Rcd 13717 (1995) ("*Frame Relay Order*"). There, in ruling that AT&T's frame relay service was a "basic" transmission service, the Chief of the Common Carrier Bureau also noted that the fact that the frame relay service was used to deliver the enhanced "InterSpan" service did not "contaminate" the entire service so as to render it "enhanced" and

The reality is that information services can only be provided to the public over a common carrier telecommunications facility. This was the very essence of the Commission's *Computer II* proceeding, which resulted in the determination that enhanced services would not be regulated under title II of the Communications Act. In that proceeding, the Commission decided that there was no need to regulate enhanced services, regardless of who offered them, because the Commission could continue to carry out the statutory purpose of the Communications Act by simply regulating the essential "common building block" -- the underlying basic transmission service -- without which no information service can be provided.

The key requirement of the *Computer II* proceeding that the cable industry has studiously ignored in its numerous filings with the Commission and the courts was established by the Commission in 1979, and has remained in place ever since.[3] In 1979 the Commission required that all "enhanced non-voice services" must be provided on a resale basis, which meant that the underlying facilities and network capacity used as the "communications pipeline"[4] must be available to all pursuant to tariff. The Commission stated that the intent of this tariff requirement is that:

> "an environment is created where the licensed transmission facilities of a carrier are available to all providers of 'enhanced' services on the same basis, i.e. in terms of access, interconnection, rates, etc. The common carrier transmission facility necessary for the provision of an 'enhanced' service becomes a separate part of the service which must be acquired pursuant to applicable tariff by any carrier entity, whether that entity is the resale entity of the underlying carrier, an existing resale carrier, or a new entrant. Since the transmission facilities must be acquired pursuant to tariff, the potential for using the transmission component of the service to subsidize a new or innovative service is substantially minimized. The isolation of the transmission component enables any carrier to provide an enhanced non-voice communications service on the same basis, without threat of unfair competitive advantage accruing to a given carrier by virtue of its control over the underlying transmission facilities. The transmission

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therefore unregulated. Instead, the *Order* noted that the Commission had never applied the contamination theory to facilities-based carriers, and that to do so "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework." *Id.* at 13723. Cox's attempt to distinguish the *Frame Relay Order* in footnote 27 at page 34 of the Cox Brief ignores the fact that the *Order* specifically ordered AT&T to unbundle its frame relay service from its enhanced InterSpan service. Accordingly, the fact that AT&T might also have offered the frame relay service separately from the enhanced service was irrelevant to the Commission's separate treatment of the pure transmission component of the bundled service.

[3] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 72 FCC 2d 358 (1979) (hereinafter *Tentative Decision*).

[4] *Id.* n. 61.

facility would be common to all entities and is removed as a competitive element of the service."[5]

The Commission went on to state in the Tentative Decision that "this structure requires the facilities of the underlying carrier to be transparent to the information transmitted and for a carrier to provide a 'pure transmission' service which forms the basis upon which all 'enhanced' services are provided."[6] Foreshadowing its words in the *Final Decision*, the Commission stated further that "[t]he underlying carrier's transmission facilities become the basic building block upon which computer facilities can be added to perform myriad combinations and permutations of processing activities."[7] Nothing in the *Final Decision* altered the tariff requirements of the *Tentative Decision*, and in fact the Commission used almost the identical language to reiterate the requirement, saying:

> "an essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced service providers are dependent on the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus, those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions."[8]

Nothing in the *Tentative Decision* or the Commission's *Final Decision* in 1980 provides for any exclusion from its requirements for cable facilities.[9] Thus, it is

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[5] *Id.* at 397 (¶ 73) (emphasis added).

[6] *Id.* at 398 (¶ 75) (emphasis added).

[7] *Id.*

[8] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (hereinafter *Final Decision*) at 474-475 (¶ 231) (emphasis added).

[9] The tariff requirements of the *Tentative Decision* were adopted by the Commission as a requirement applicable to all carriers. 72 FCC 2d 358, 444 (¶ 172). The *Final Decision* specifically adopted the tariff requirements. 77 FCC 2d 384, 474-475 (¶ 213). *See also In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 84 FCC 2d 50, 75 n. 19 (1980) (Reconsideration of Final Decision) ("Those carriers not subject to the separate subsidiary requirement, when employing their own common carrier transmission facilities in the provision of enhanced services, must obtain transmission capacity pursuant to the terms and conditions embodied in their tariff. This proceeding does not remove a carrier's obligation to provide basic services, nor does this proceeding alter existing policies and rules under which carriers are certificated, or transmission facilities are owned or constructed.") (emphasis added). *See also Computer and Communications Industry Association v. Federal*

information service providers who purchase from a separate common carrier the underlying transmission capacity used to offer their service to the public that remain completely unregulated. [10] Those who use their own facilities to provide information services, however, are regulated with respect to the underlying conduit used to transmit those information services, while the information services themselves are unregulated.[11]

The Commission recently reaffirmed the requirement that facilities-based carriers must offer separately the telecommunications transmission capacity that they use to provide information services to the public:

> We clarify that the requirement in *Computer II*, that carriers not subject to the separate subsidiary requirement acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are used, does not prohibit them from offering packages of telecommunications service, including interstate, domestic, interexchange service or local exchange service, and enhanced services at a single price. As long as they comply with the requirement to make their underlying transmission capacity for the enhanced service available on nondiscriminatory terms, it is consistent with the Commission's reasoning in *Computer II* to clarify that these carriers may offer bundled packages. . . . We conclude that a natural outcome of allowing these carriers to operate on an integrated basis is that they would be able to offer packages of telecommunications and enhanced services at a single price, and indeed, there is no restriction against such packaging for these carriers in *Computer II*, provided that they comply with the safeguard to make available the underlying transmission capacity for the enhanced service.[12]

Based on this clear, longstanding, and recently reaffirmed Commission precedent, Cox is simply and entirely wrong when it claims that "[t]he law will not . . . carve out a

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Communications Commission, 693 F.2d 198, 219 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983) ("Moreover, certain safeguards were adopted with regard to the exempt carriers. For example, if such carriers wish to offer enhanced services, they must sell themselves the basic transmission service 'pursuant to the terms and conditions embodied in their tariff.'" (citing to 84 FCC 2d at 75 n. 19)).

[10] *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, 91 FCC 2d 59 n. 8 (1982) ("We have already found that enhanced services built on the transmission services obtained from underlying carriers are not common carrier offerings subject to our Title II jurisdiction.") (emphasis added).

[11] Congress used a similar facilities-based approach for determining when regulation applies when it enacted Title VI of the Communications Act to regulate cable services in 1984. A video programming provider is regulated as a "cable operator" under Title VI only when that provider also owns or controls the facilities used to deliver the video programming to subscribers. *See* 47 U.S.C. § 522(5) and *National Cable Television Association v. Federal Communications Commission*, 33 F. 3d 66, 74-75 (D.C. Cir. 1994).

[12] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, CC Docket Nos. 96-91, 98-183, at ¶ 40 (rel. March 30, 2001) (emphasis added).

telecommunications component to force CoxCom into the role of a common carrier."[13] To the contrary, the Commission in the *Computer II* proceeding explicitly "carved out" the telecommunications component of information services and explicitly required facilities-based information service providers to make their transmission services available to other information service providers. As the discussion above makes clear, it was the fact that the transmission capacity would be available to all information service providers on nondiscriminatory terms that allowed the Commission to avoid regulation of the information services themselves.[14]

The applicable Commission rulings are not subject to interpretation or debate; the law is as clear on this point as it can be. What Cox and NCTA are really asking the Commission to do is to reverse *Computer II* and its progeny, but they continue to refuse to admit to that purpose. The fact that the cable industry is unwilling to acknowledge what it is really requesting of the Commission does not make the Commission's task any less clear, however. The simple choice before the Commission is between enforcing existing law or attempting to change the law. There is no legally defensible outcome under which the Commission may state that current law does not explicitly require cable companies that provide Internet access using their own facilities to sell their underlying transmission to other information service providers. Moreover, given that the Commission has already explicitly determined that Congress intended to adopt the *Computer II* regime when it enacted the Telecommunications Act of 1996, it is not within the Commission's power now to repeal that set of rules. [15]

Although the legal analysis summarized above entirely disposes of the cable industry's "pure transmission" argument, EarthLink also notes that Cox and other cable companies are in fact by their own admission offering "pure" high-speed data transmission (suitable for Internet connections) directly to the public for a fee. In its January 10, 2001 Reply Comments in Docket No. 00-185, EarthLink provided a number of examples of cable company subsidiaries and divisions that have sought and obtained state public utility commission certification to provide local exchange and interexchange services using the same transmission facilities that they use to provide cable modem service. *Id.* at 2-5. Among the examples that EarthLink mentioned in that pleading was Cox's representation to the Georgia Public Service Commission that Cox was at the time

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[13] Cox Brief at 35.

[14] In fact, the court explicitly relied on this safeguard in upholding the Commission's *Computer II* rules. *See Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198, 219 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983). EarthLink also notes that NCTA's attempt to characterize the "unbundling" requirements of *Computer II* as applicable only to "monopoly telephone companies" (NCTA Interactive TV Reply Comments at 45, citing 77 FCC2d at 468 (¶ 220)) is not correct. The requirements to which NCTA refers were structural separation requirements applicable only to AT&T (and post breakup to the RBOCs), not the requirement to make available the underlying transmission capacity, which is applicable to all carriers.

[15] *See Universal Service Report To Congress*, 13 F.C.C. Rcd 11501, 11511; *see also* FCC *Amicus Brief* at 3-4 in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). We note that Cox agrees with the Commission and EarthLink that Congress in the 1996 Act codified the Computer Inquiries' definitions and basic/enhanced distinctions. Cox Brief at 12-13.

of its Georgia application certificated as a LEC in at least 9 states. *Id.* at 2 n.7. Similarly, the Commission's newly released Form 499-A carrier search tool (DA 01-2465, October 29, 2001) indicates that Cox entities are registered as LECs in eighteen or more states. *See* Exhibit 1 hereto.

Against this background, one of the statements in the Cox Brief is especially difficult to square with its actual activities. At page 36 of its brief, Cox states that, "[a]lthough CoxCom's service uses various facilities to transmit data, there is no separate transmission path that could function independently of the higher functions that are included in the service." Compare this statement to the description of its services that Cox provides on its website:

> Cox Business Services provides a range of advanced communications services, including high-speed Internet access, local and long distance telephone, data transport and video solutions, all delivered over our state-of-the-art fiber optic-based broadband network. Unlike many providers, we own and maintain our network. (emphasis added)

Under the heading "Internet/Data Services," Cox elsewhere on its website describes the range of its service options this way:

> As a provider of dedicated and switched data networking services, Cox's products can be utilized in a multitude of network applications. From our dedicated symmetrical, leased line Cox Internet T-1 (1.544 Mbps) and high-speed cable modem services to our Cox Internet 10 Mbps fiber-optic service, our solutions are efficient for small networks or nationwide configurations.

Moreover, Cox makes it clear that all of these data, voice, and Internet services are offered over a single network:

> Our advanced broadband network of coaxial and fiber optic cables has become the conduit through which we are delivering other advanced communications services including digital video, local and long-distance telephone and high-speed Internet access services. . . . Blazing the trail of telecommunications competition mapped out by Congress in the 1996 Telecommunications Reform Act, Cox has evolved into a full-service provider of advanced video, voice, and data services for homes and businesses.[16]

As these examples from Cox's own promotional materials make clear, an acknowledgement by the Commission of existing law would not in any way "force" Cox into the role of common carrier. Cox has chosen freely to enter into the common carrier telecommunications business, and it is rightfully enthusiastic about describing the wealth of data and voice telecommunications services that it offers to its customers. Having made that choice to be a common carrier, however, both by offering "pure" transmission and by offering information services over its own facilities, neither Cox nor any other

[16] Printed versions of the web pages bearing these quotes are attached as Exhibit 2.

cable company with similar offerings can now avoid the undisputed legal obligations that attach to providers of such services.

II. There Is No Other Rationale Under Which Cable Companies That Use Their Own Facilities To Provide Internet Access Can Lawfully Refuse To Sell Transmission To Other ISPs.

Although EarthLink disagrees with virtually all of the legal analysis made by the recent *ex parte* filings, the most recent Cox offering does properly focus primarily on the central question posed in the previous section, i.e., whether the law allows a facilities-based carrier that offers its information services indiscriminately to the public for a fee to refuse to sell the underlying transmission service to other ISPs. Because the recent Cox and NCTA papers also raise arguments in addition to the "pure transmission" argument, we briefly address below some of the other arguments that the cable industry has used to justify its refusal to fulfill its common carrier obligations.

a. Cable Modem Service Is Not A "Cable Service."

In their recent *ex parte* filings, Cox and NCTA continue to urge the Commission to find that cable-based Internet access is a "cable service" within the meaning of the Communications Act. The courts that have reached that argument have rejected it. *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 1999); *Gulf Power Co. v. F.C.C.*, 208 F.3d 1263 (11th Cir. 2000), *appeal pending*. EarthLink has discussed this issue at length in earlier filings, and will not repeat those discussions here. *See, e.g.*, EarthLink Comments in Docket 00-185 at 4-19 (December 1, 2000); EarthLink Reply Comments in Docket 00-185 at 13-25 (January 10, 2001).

Further, the court in *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001), explicitly held that a "cable modem platform," i.e. the underlying transport service used to provide Internet access over cable facilities, constitutes a "telecommunications facility" because it is "a pipeline for the transmission . . . of information of the user's choosing. . . ." *Id.* at 363. The *sine qua non* of a cable service is that it is the transmission of information chosen by the cable operator, not the subscriber.[17] Accordingly, the *Henrico* decision's logic precludes a finding that cable-based Internet access is a cable service. By the same token, Cox's assertion that "telecommunications" are used to provide cable service as well as information services[18] is contrary to the plain language of the statute, because telecommunications by definition

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[17] *See National Cable Television Association v. Federal Communications Commission*, 33 F. 3d 66, 71 (D.C. Cir. 1994), in which the Court of Appeals affirmed the Commission's determination that common carrier transmission of video programming to subscribers is not a "cable service" because the term "transmission" in the definition of "cable service" requires the "active participation" of the cable operator in the selection and distribution of video programming.

[18] Cox August 15, 2001, *ex parte* at 1.

involves the transmission of information of the user's choosing, whereas cable services involve information chosen by the service provider.

b. Cable Operators Can Be Common Carriers When They Use Their Cable Facilities to Offer Non-Cable Services.

It is well established by the courts and Congress that cable operators can be treated as common carriers when they are providing non-cable services. As EarthLink outlined in considerable detail in its Reply Comments, the cable companies themselves have freely applied for and received certificates of convenience and necessity from numerous State commissions for the provision of telecommunications services. EarthLink Reply Comments in Docket 00-185 (January 10, 2001) at 1–5 and Exhibits 1 – 6. Further, numerous courts have found that cable facilities can be used to provide common carrier telecommunications services. *See, e.g., National Association of Regulatory Utilities Commissioners v. Federal Communications Commission*, 553 F.2d 601, 608 (D.C. Cir. 1976); *City of Dallas, Texas v. Federal Communications Commission*, 165 F.3d 341, 354 (5th Cir. 1999). Finally, Congress made it clear in both the Cable Act of 1984 and the Telecommunications Act of 1996 that cable facilities can be regulated as common carrier facilities when used to provide non-cable services. 47 U.S.C. 541(d);[19] 47 U.S.C. § 571. We reiterate this self-evident point simply because the only difference between cable companies that provide Internet access (which have not been required to obey the law) and local exchange carrier ISPs (which generally have been required to obey the law) is the nature of the wire employed. The definition of "telecommunications service," of course, is a functional definition that applies "regardless of the facilities used." 47 U.S.C. § 153(46). That definition does not authorize different regulatory treatment based on the type of transmission facility employed.

c. The Telecommunications Used to Transmit Internet Access Services Over Cable Are Not "Private Carriage."

In its September 20 *ex parte* filing, NCTA argues in the alternative that the telecommunications used to deliver Internet access service is "private carriage," i.e., not common carriage covered by title II of the Communications Act. NCTA summarizes this argument by stating that "[w]hen cable operators enter into individually negotiated access agreements with ISPs, that is private carriage." The argument fails for two glaringly obvious reasons.

First, it is simply irrelevant to the common carrier analysis that cable companies might seek to negotiate individual terms with ISPs if and when those cable companies

[19] The House Committee report on the Cable Act stated "[s]ubsection (d) also provides that nothing in Title VI shall be construed to affect authority to regulate any cable operator to the extent that such operator provides any communications service other than cable service, whether offered on a common carrier or private contract basis. . . . It is the intent of subsection (d) that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the FCC be unaffected by the provisions of Title VI." H.R. Rep. 98-549 (1984) at 63.

decide to offer the transmission used for cable modem service as a stand alone service sold to ISPs. The plain fact is that every major cable company is today holding itself out to millions of individual users to whom it offers its facilities-based Internet access service on standard terms and conditions.[20] As discussed above, that offering includes both the information service of Internet access and the telecommunications service over which the information service rides. Under the standard for common carriage set forth *in National Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 ("*NARUC I*"), holding oneself out indiscriminately to the public to provide a service that permits users to transmit intelligence of their own design and choosing renders one a communications common carrier.[21] *Id.* at 642-43. For a full discussion of the *NARUC I* case and the common carrier status of cable companies in various states, see EarthLink's Reply Comments in Docket 00-185 (January 10, 2001) at 1-9 (LEC certification) and 33-46 (*NARUC I*). Since the cable companies are already actively offering "cable modem service" to millions of people on a common carrier basis, they cannot avoid their common carrier obligations to ISPs simply by refusing to serve them or by negotiating different terms.

The second reason why "cable modem service" is a common carrier service also comes from *NARUC I*. In addition to the "indiscriminate holding out" test discussed above, the *NARUC I* court held that a carrier will be deemed a common carrier if it is under a "legal compulsion" to serve indiscriminately. *NARUC I*, 525 F.2d at 642-643. As discussed above, the *Computer II* decisions and their progeny require that all facilities-based carriers that provide information services to the public must make their transmission capability available on nondiscriminatory terms. That requirement is a plain legal compulsion to serve indiscriminately, thus bringing cable modem service under the common carriage regime under both independent *NARUC I* tests.

d. The Universal Service Report Cited By The Cable Industry Does Not Support The Industry's Position.

Finally, it should be noted that throughout this proceeding the cable industry has relied almost exclusively on a single FCC document in support of its position that the contamination theory applies to Internet access using cable modem service. That document is the *Report to Congress on Universal Service*, 13 FCC Rcd. 11501 (1998), in which the Commission discussed at some length the relationship between telecommunications service and information service with respect to the universal service obligations in the Communications Act. Ironically, in that document the Commission explicitly stated that:

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[20] Cox probably said it best when it stated to the court in its brief that, "[t]his case, however, is not about a theoretical future common carrier service." Cox Brief at 35.

[21] As the Commission recently reiterated, the "indifference" requirement "hinges not on [the carrier's] intent, but rather on the carrier's conduct in actually serving customers. The critical inquiry is whether the carrier makes *ad hoc* determinations about the provision of service to particular customers." *In the Matter of AT&T Corporation v. Jefferson Telephone Company*, Memorandum Opinion and Order, FCC 01-243 (released Aug. 31, 2001). Clearly there is no *ad hoc* determination with respect to each of the millions of subscribers to which cable modem service is being offered on standard terms and conditions.

> We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service. The Act distinguishes between Title II and Title VI facilities, and we have not yet established the regulatory classification of Internet service provided over cable television facilities.[22]

Further, the Commission said in the *Report* that it intended to examine further the issue of Internet service providers who own their own transmission facilities.[23] In fact, when other telecommunications providers recently attempted to rely on the same analysis in the *Report to Congress on Universal Service* cited by the cable industry to try and escape regulation under the Communications Act, the Commission rejected their attempt, saying:

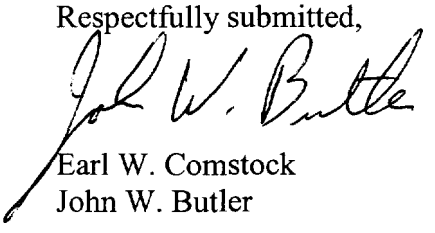
> Yet, the very fact that the Commission recognized that a situation in which an information service provider owns the underlying transmission facilities might be cause for different treatment undercuts the BOCs reliance on the language in the Report to demonstrate that BOCs could never be deemed to be providing interLATA telecommunications when they provide an information service.[24]

By the same token, the cable industry's reliance on the Report is also misplaced.

* * * *

We hope that the points summarized above will help to focus our discussion when we meet. If there are any other questions that you might have, we would be pleased to address those as well.

Respectfully submitted,



Earl W. Comstock
John W. Butler

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[22] *Report to Congress on Universal Service*, 13 FCC Rcd. 11501, 11535 n. 140.

[23] *Id.* at 11534.

[24] *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934*, 16 FCC Rcd. 9751, ¶ 38 (Apr. 27, 2001) (Order on Remand).

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812437	Cox Communications PCS, LP	Sprint PCS
817278	Cox Connecticut Telcom, LLC	Cox Communications
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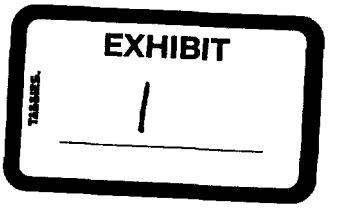

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Orange County, CA

COX Business Services

E COUNTY

Let's get down to business, shall we?

Cox Business Services provides a range of advanced communications services, including high-speed Internet access, local and long distance telephone, data transport and video solutions, all delivered over our state-of-the-art fiber optic-based broadband network. Unlike many providers, we own and maintain our network. This means we're directly accountable for your customer service needs. And, as a division of Cox Communications, we're part of one of the largest broadband communications companies in the nation. In other words, we're here to stay.

To find these services offered in your area...

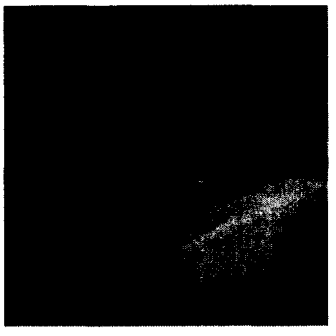
Choose a Service...

EXHIBIT 2

ERNET

Fast. Reliable. Affordable.

As a provider of dedicated and switched data networking services, Cox's products can be utilized in a multitude of network applications. From our dedicated, symmetrical, leased line Cox Internet T-1 (1.544Mbps) and high-speed cable modem services to our Cox Internet 10 Mbps fiber-optic service, our solutions are efficient for small networks or nationwide configurations.



Whether you're connecting a few sites within the same city or multiple locations across the country, Cox provides access to the services you need to manage your business.

System Architecture

Cox's high capacity communications services utilize thousands of route miles of fiber optic-based cable, a self-healing fault-tolerant architecture, state-of-the-art transmission equipment, and a variety of transparent LAN and next-generation ATM networking systems.

We'll support and protect your communications lifeline with Cox's locally-based customer support. Plus, the Cox network is proactively monitored by our Network Operations Center (NOC) 7-days-a-week, 24-hours-a-day.

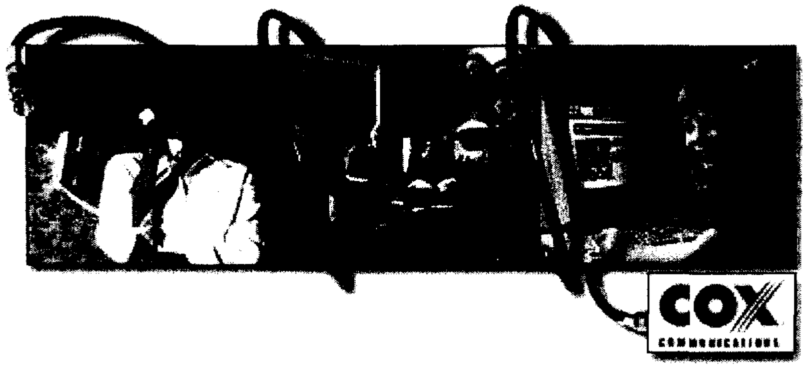
Cox Internet Advantages

Cox can provide your business with the following high-speed Internet access features:

- Supports serving and Web site hosting capabilities
- Multiple IP addresses available
- No local loop charges on most products
- Domain name registration - (www.your company.com) for a professional Web presence
- Always connected 24-hours-a-day
- No dial-up necessary
- Reliable network up-time
- High data integrity
- Minimal data transmission loss
- Freedom from electromagnetic interference
- 24 hours a day, 7 days a week network support

To determine which one of our technologies best suits your needs, review our Internet Product Comparison Chart.

Choose from the menu to get local info
-Select Location- GO



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FOR YOUR BUSINESS
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CAREERS@COX
ABOUT COX

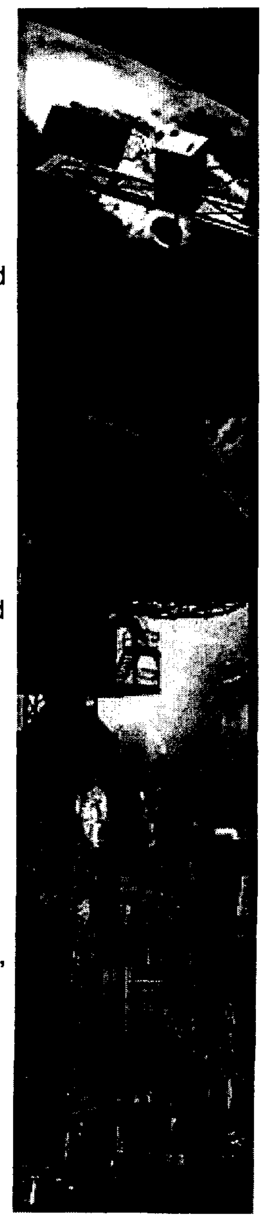
Investor Center
Press Room
For Your School

Corporate & Financial

About Cox Communications
Corporate Officers
Fact Sheet
Headquarters Address
Other Cox Sites
Timeline

ABOUT COX

About Cox Communications



With one of the highest-capacity and most reliable broadband delivery networks in the world, Atlanta-based Cox Communications, Inc. is among the nation's largest broadband communications companies, serving 6.2 million customers in more than 20 states.

Cox has been building high quality communications networks since it first entered the cable television business in 1962, and delivering cable television programming remains our core business today. Our advanced broadband network of coaxial and fiber optic cables has become the conduit through which we are delivering other advanced communications services including digital video, local and long-distance telephone and high-speed Internet access services. We are also developing other powerful offerings, including video-on-demand and interactive television services, that will be delivered to customers over our broadband network.

Blazing the trail of telecommunications competition mapped out by congress in the 1996 Telecommunications Reform Act, Cox has evolved into a full-service provider of advanced video, voice and data services for homes and businesses. In fact, our Orange County, Calif., operation made history in 1997, becoming the nation's first cable system to deliver all of these services via a single broadband network.

Our entrepreneurial spirit has its roots in our majority investor, Cox Enterprises, Inc., which traces its history back to 1898. That year, James M. Cox, who would later serve three

terms as governor of Ohio and would run for President in 1920 as the Democratic nominee, purchased his first newspaper, the Dayton (OH) Evening News. More than a century later, the company Gov. Cox built has annual revenues approaching $8 billion, and has extensive interests in newspapers, television and radio stations, Internet web sites and automobile auctions. Cox Enterprises is the majority shareholder of Cox Communications.

Cox Communications' more than 20,000 employees are widely regarded as among the best in the cable industry, having earned the company extensive recognition as *the* leader in customer care. Cox has been named Cablevision Magazine's Operator of the Year twice in five years and has won numerous awards for excellent customer care.

Cox is deeply committed to the communities it serves with education being the cornerstone of the company's community outreach efforts. Through Cox Cable in the Classroom, we have long provided cable service free to every elementary and secondary school in our service areas, and have begun providing cable modems to a number of schools in areas wired for high-speed Internet access through our Cox Line to Learning program. We have also established Cox Model Technology Schools in many of our communities where the latest advancements in technology are put to the test as teaching tools.

In addition to providing advanced communications services, Cox is an investor in several leading programming networks, including Discovery Channel, and is a stake holder in a variety of technology companies, including Sprint PCS and Excite@Home.

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